

The 2019-2020 novel coronavirus outbreak and the importance of good faith for international law

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The 2019-2020 novel coronavirus (2019-nCoV) outbreak first identified in Wuhan, China currently stands at the center of the international community's focus. The World Health Organization (WHO) issues [daily situation reports](#) on the virus' spread. Alternatively, other sources are constantly being updated thanks to almost real-time tracking technology (see also the [website created by members of the John Hopkins Center for Systems Science and Engineering](#)). At the time of writing, the tally of infected stands at approximately three thousand, with almost one hundred casualties. The virus at stake is from the same "family" as the Severe Acute Respiratory Syndrome (SARS), which also engendered a crisis in China and throughout multiple parts of the world in 2002-2003. The epidemiological similarities between both diseases are relevant both for medical and legal purposes.

The apparent velocity of the transmission and the continuous uncertainty regarding its epidemiological features have strained the effectiveness of the legal regime set by the [International Health Regulations \(IHR\) of 2005](#). The regime was agreed upon precisely after the 2002-2003 SARS crisis provided political momentum for it. As stated in its Preamble, the IHR are meant to be "the key global instrument for protection against the international spread of disease". But events such as the coronavirus outbreak currently unraveling in China lead to core questions on whether and how the legal instrument contributes to fulfilling this goal. In the following lines, I will provide a brief overview of some of the legal provisions relevant for the current debacle. Afterwards, I deal with how the underlying uncertainty related to the novel coronavirus makes it all the more important to look at the IHR's operational dimension. Lastly, I argue that the proper functioning depends more on principles such as good faith, than on distinct legal arguments based on the idea of breach or international responsibility.

The legal regime in a nutshell

Under Article 12 IHR, the WHO's Director General has the power to declare a public health emergency of international concern (PHEIC). S/he can only do so after receiving the views of an Emergency Committee, as established by Article 48 IHR. A PHEIC is defined in Article 1 IHR as an event which "...constitute[s] a public health risk to other States through the international spread of disease" (emphasis added), and "potentially require[s] a coordinated international response".

Determining whether an event constitutes a PHEIC or not should be based, first and foremost, on the available epidemiological data. Depending on how feasible it is to collect it, the main sources for the necessary information are states themselves,

and namely national authorities. In accordance with Article 7 IHR, States Parties are required to provide “all relevant public health information”. Alternatively, Article 9(1) IHR states that the WHO may also take into account reports from sources other than authorities. In theory, states are not the exclusive hubs of information. Nevertheless, the WHO is required under Article 10(1) IHR to verify all reports provided through non-governmental channels with states themselves. Yet Article 10(4) IHR does provide for the possibility to sideline states parties in case of non-collaboration.

Article 6 IHR sets upon obligations to states to report any event that possibly constitutes a PHEIC in the course of 24 hours. [Recent institutional documents](#) mention the investigation by the WHO of 440 health-related “events” during 2019. The biggest number of such events are related to infectious diseases. In the past, one or two amongst these hundreds of reports have actually led to summoning an Emergency Committee to decide whether declaring a PHEIC is justified. These figures reflect the extent to which the organization processes Member States’ information. Considering how such decision-making has to be taken rapidly (at times, in the span of hours), an interpretation of the IHR’s contents by WHO officials –with the authority ultimately residing on its Director-General– occurs almost on a daily basis.

Under Article 15 IHR, the WHO issues temporary recommendations after declaring a PHEIC. They may consist, among other things, of not imposing travel and trade measures which are more restrictive than necessary, whilst indicating which ones would be advisable. But temporary recommendations have been sidelined in the past. Non-observance by Member States was reported e.g. in [last year’s World Health Assembly \(May 2019\)](#), amidst an Ebola outbreak in the Democratic Republic of the Congo.

Breaches of the IHR’s obligations do not lead to sanctions. And given the non-binding nature of recommendations, there are no direct legal consequences for their disregard. While, in theory, dispute settlement is available under Article 56 IHR for establishing international responsibility, these provisions have never been invoked. One can also wonder whether such a route would have any meaningful outcome in a context such as disease outbreaks. Therefore, the IHR’s proper functioning requires resorting to an alternate legal perspective.

Lastly, there are references to human rights throughout the IHR, though mostly with a focus on cross-border travelers. Although not fully addressed in this post, the public health response by the Chinese government so far raises core questions on whether they are legally justified or not, and under which criteria. It is unclear whether Article 43 IHR, providing for the adoption of “additional” public health measures, is also applicable to a purely domestic dimension. Still, the magnitude of governmental acts amidst the spread of novel coronavirus [should lead to further rights-based analyses](#).

The premises of disease surveillance: it’s all about the data

Against this backdrop, on 22 and 23 January, 2020, an Emergency Committee was convened in the headquarters of WHO in Geneva to discuss whether the coronavirus

outbreak constitutes a PHEIC. [The outcome was divided](#). A PHEIC was not declared and, instead, the Emergency Committee requested more information from Chinese authorities. A proper determination of the risk of international spread can only be undertaken if the available data allows it.

Such decision-making amidst the corona outbreak highlights the unsurmountable weight of disease reporting by WHO Member States. At the outset, the WHO does not possess the capacity for planetary, on-the-ground oversight. Hence, the organization is dependent on reports provided to it by other parties. Without their cooperation in the collection and report of data, the system is simply non-functional. It can be assumed, then, that sharing such information is in the interest of the international community of states. Yet this is not so straightforward.

What lies beneath some of the IHR's obligations is, broadly speaking, a balance between national interests and those of the international community. In an ideal setting, they are both aligned. But past experiences have shown a reluctance by states to be fully transparent. In fact, the current IHR gained momentum, among other things, precisely after the Chinese government was not fully transparent in its reporting during the SARS crisis (2002-2003). The potential reasons for non-cooperation by states entail are based on a preemptive calculus. Declaring a PHEIC due to an outbreak may lead to strong measures being adopted by other states. After identifying the source, travel bans, quarantines of travelers, or restrictions to trade may follow suit. In this sense, PHEIC declarations are ultimately an instance of [governance through information by an international institution](#), the WHO. At the same time, there can be no governance of disease outbreaks *without* information. The available legal tools and the organization's institutional capacity do not allow for a full-fledged data collection process independent of states. Consequently, a widespread refusal by the WHO's Member States to share information would lead to a shutdown of the whole system. Needless to say, it would put the whole international community at risk. This means that other legal tools need to be taken into account.

Revisiting the importance of good faith for international law

At times, international law analyses disregard the relevance of subjective political elements as beyond the reach of the field. Framing the obligations of states, and the ensuing international responsibility for their breach, would appear to be the beginning and the end. While this might also be applicable in the case of the IHR, as argued above it only represents a mere fraction of the story.

The discussions on whether the IHR needs to have stronger oversight mechanisms or not are beyond the scope of this blogpost. [Recent initiatives in this sense](#) are praiseworthy. In any case, the current framework makes disease surveillance fully dependent on states' willingness to collaborate. This effectively means that the necessary – but certainly not sufficient – nature of [good faith](#) needs to be revisited. In its absence, regimes such as the one provided by the IHR are non-operational. As highlighted by the most recent meetings of the IHR Emergency Committee, accurate decision-making can only take place if there is reliable information at hand. [The high complexity involved in identifying the virus' epidemiological features](#) hinders by

itself the possibilities to undertake accurate risk assessments. This makes it all the more important for both the WHO and its Member States to engage trustfully with each other. While second-guessing is always possible, and maybe it is sometimes required, the need for rapid decision-making makes distrust a very costly endeavor.

In conclusion, the arguments herein highlight why and how good faith reporting is what keeps the WHO's surveillance system running. The relevance of this legal principle for the functioning of regimes such as that of the IHR should not be underestimated. Amidst a setting of trade wars, recurring unilateral uses of force and general pushback against international institutions, prospects for good faith cooperation may seem shaky. But in the face of common threats, such as the international spread of disease, there might just be instances in which geopolitical tensions may be successfully overcome. Let us hope that the ongoing novel coronavirus outbreak in China is one of those occasions.

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